FILE COPY

No. 853

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

MICHAEL P. GRACE, II, individually and as a Trustee under the Last Will and Testament of JANET GRACE, *Petitioner,*

against

DEFENDANTS, INC., REAL PROPERTY OWNERS, INC., GRACE NATIONAL BANK OF NEW YORK, GRACE PROPERTIES, INC., in Liquidation and ALBERT JORGENSEN, COMMITTEE OF JANET MAC QUEEN, Grace by Grace National Bank of New York and Michael P. Grace, II, its co-guardians, CHARLES MAC DONALD, GRACE, individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, JOSEPH P. GRACE, JR., individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased and JOHN P. BOLAND, *Guardian ad Litem* for JANET MAC QUEEN GRACE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

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MICHAEL P. GRACE, II, individually and as a Trustee under the Last Will and Testament of JANET GRACE, *Petitioner,*

against

DEEPDALE, INC., REAL PROPERTY OWNERS, INC., GRACE NATIONAL BANK OF NEW YORK, GRACE PROPERTIES, INC., in Liquidation and ALBERT JORGENSEN, COMMITTEE OF JANET MAUREEN GRACE, by Grace National Bank of New York and Michael P. Grace, II, its members, CHARLES MACDONALD GRACE, individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, JOSEPH P. GRACE, JR., individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, and JOHN P. BOLAND, *Guardian ad Litem* for JANET MAUREEN GRACE, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

Petitioner, Michael P. Grace, II, prays that a writ of certiorari issue to review the final judgment in the above matter of the Supreme Court of New York,

County of Nassau, November 4, 1959, affirmed by judgment of July 28, 1959, of the Supreme Court, State of New York, Appellate Division—Second Department, leave to appeal to denied, and appeal of right dismissed, by the Court of Appeals of New York.

OPINIONS BELOW

The trial court rendered an opinion, which appears in volume II of the printed record, at p. 1599. Neither the Appellate Division nor the Court of Appeals rendered any opinions in denying petitioner relief. The pertinent orders of the Appellate Division and the Court of Appeals are included in the appendix hereto; the trial court's opinion is not included in the appendix because the court has been furnished nine copies of the printed record pursuant to Rule 23(1)(i).

JURISDICTION

Final judgment was rendered against petitioner in the trial court on April 3, 1958. R. 115-123. He appealed to the Appellate Division, which affirmed without opinion on July 28, 1959. The judgment of affirmance appears in the appendix hereto. He sought leave to appeal to the Court of Appeals, which was denid without opinion by the Court of Appeals on December 30, 1959. He also filed a separate constitutional appeal (an appeal as of right) in the Court of Appeals, as permitted by New York practice, but which was dismissed on March 3, 1960. Petitioner has no further remedies open to him in any New York court. No rehearings have been sought in any court. If from the dismissal of the appeal as of right, time within which this petition might be filed would expire

June 1, 1960; but if from the denial of leave to appeal of December 30, 1959, time would expire March 29, 1960. After timely application, filed March 24, 1960, time for filing this petition was extended from March 29, 1960, to April 11, 1960, by Mr. Justice Harlan, by order dated March 30, 1960. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTION PRESENTED

In a civil case and as to one who wishes counsel, does due process guarantee the right to counsel?

Is due process under the Fourteenth Amendment denied where the trial court, in a state civil proceeding, refuses to permit the plaintiff to appear by retained counsel of his choice, and requires plaintiff to appear by counsel who no longer represents him, who does not want to represent plaintiff and who refuses even to speak to plaintiff, and whom plaintiff does not want to represent him?

STATEMENT OF THE CASE

Petitioner and others owned some valuable real property in Nassau County, New York, which a country club desired to buy. See complaint, R. 13-19. The owners, including petitioner, negotiated with the purchaser and entered into a contract of sale, dated May 6, 1955, calling for a price of $950,000. The contract appears at R. 20-50. Later (as alleged in the complaint) petitioner came to believe that the club, some of his co-owners and others, had deliberately concealed from him other offers for the property; concealed the fact that one of his co-owners was an applicant for membership in the club; and had told other potential buyers the property was not for sale. On the theory

that his agreement to the contract had been fraudulently procured, petitioner sued in the Supreme Court of Nassau County to set the contract aside. R. 13-19. Defendants denied misconduct, and made counter-allegations and claims. R. 51-72. A protracted and difficult trial ensued, occupying 14 actual days of trial during the period October 8 through 30, 1957. R. 115. The transcript of testimony appears at R. 176-1598. In addition, there were voluminous exhibits.

Petitioner's case was tried with another case, not involved here, in which petitioner's wife, *guardian ad litem* of an infant owner of a trust interest in the same property, sought to enjoin the trustees from selling the trust interest, based on conflict of interest and lack of authority. R. 88-103.

At the opening of the trial (which was without a jury), petitioner was represented by Charles Haydon, Esq. R. 176. Mr. Haydon had handled petitioner's case since the beginning. R. 673. On October 15, 1957, a Tuesday and the sixth day of trial, Mr. Haydon sought leave to withdraw as counsel for petitioner, because of a personal falling out with petitioner. R. 668-9. The court was concerned about the delay this might cause, R. 669, and asked petitioner if he were willing to continue with Mr. Haydon as counsel. R. 675. Petitioner said yes, subject only to agreeing on a matter of policy. R. 675. The court turned to Mr. Haydon, but he refused to reconsider, R. 679, while making clear that his faith in the justice of petitioner's cause was undiminished. R. 678, see also R. 669. The court then offered petitioner to continue the trial until the following Monday, on condition that petitioner appear at that time with counsel ready to proceed. R. 684. Petitioner felt unable to agree to the offer with-

out counsel to represent him; he said, ". . . I don't know enough about my constitutional rights." R. 684. The court then decided to adjourn until the following Monday, and rule at that time whether to release Mr. Haydon; the court said:

> "If there is other counsel here to go forward on Monday morning, you [Haydon] may be relieved. Otherwise, I shall not relieve you and I will require you to go forward with the case and Mr. Grace will have to take your representation in the matter." R. 685.

The following Monday, October 21, Mr. Haydon still wished to withdraw, and new counsel presented himself, Charles Poletti, Esq. R. 688. Mr. Poletti stated that he and an associate counsel were willing to enter the case for petitioner; he asked for "a reasonable amount of time so that we can read the record and also confer with Mr. Haydon." R. 688. And, "I can assure you [the court] that we will do our job as energetically and as expeditiously as possible, because we sympathize with the situation in which you find yourself." R. 689. And, "Give us a postponement of a few days so that we can prepare, or [associate counsel] feels the earliest he could do it is two weeks." R. 689.

The court refused to grant any continuance whatever: "My order here in this will be, then, Mr. Haydon, that you will be required to continue." R. 697. Mr. Haydon immediately protested, and said, "It seems to me that the effect of your Honor's ruling is either that Mr. Grace is directed to go ahead with someone he does not want, which I think is certainly reversible error, or your Honor may be putting in jeopardy the first five or six days of the trial." R. 698. He added,

". . . if your Honor were to force me to go ahead it seems to me that I could not in justice do a complete job for the client and that in all truth your Honor may be setting up this thing so that there would have to be some reversal or a mistrial and thus the five days would be lost." R. 699. The court refused to reconsider, and stated it was ready to proceed. R. 706. Mr. Poletti withdrew in light of the ruling. R. 706.

The trial proceeded, with Mr. Haydon "representing" petitioner, although as he (Haydon) stated, ". . . I could not honestly confer with Mr. Grace [petitioner] again after what happened." R. 679. Mr. Haydon went through the motions of examining witnesses until Wednesday, October 23, when petitioner instructed him by telegram to proceed no further. R. 983. The court construed the telegram as signifying that petitioner chose to rest his case, R. 986, 987, 993, but petitioner stated this was not so, but that he found it futile to proceed under the conditions forced on him by the court. R. 993, 1002. He protested repeatedly that he had no counsel, R. 1003, 1192, and that Mr. Haydon had refused to speak or confer with him. R. 1003, see also R. 671, 1562. He said:

> "I am making a public declaration on constitutional rights that it is impossible to prosecute this case under the present set of circumstances." R. 1002.

That Mr. Haydon was not in fact representing petitioner is plain from the record. *E.g.*, R. 1038, where Mr. Haydon refused to cross-examine a witness. And see R. 1213, where Mr. Haydon himself described his forced presence as that of a mere "spectator." Mr. Haydon would not even speak to petitioner; petitioner told the court, "I have tried to talk to Mr. Haydon.

There is no response on his part." R. 1562; see also R. 1003, 671. Petitioner made several attempts to secure other counsel, but none would enter under the conditions imposed by the court. R. 1565; see also R. 1213.

The case ended, and the court delivered an opinion, R. 1599-1625, almost a third of which was devoted to justifying its action on the denial-of-counsel issue, R. 1617-1623. The court gave the following reasons:

First, Mr. Haydon "was present at every session and remained throughout the trial ready to examine witnesses and to proceed, except for the fact that Michael Grace requested that he not do so." R. 1622. (This statement implies that Mr. Haydon was willing to proceed, but that petitioner was unwilling for him to do so. The record shows the exact opposite is true; that Mr. Haydon vigorously resisted representing petitioner; that he remained physically present only under court order; that he would not speak to petitioner; and that petitioner discharged Mr. Haydon only several days later, when the farce became ridiculous. See preceding discussion, especially R. 668-9, 675, 698-9, 987, 993, 1002-3, 1038, 1213, 1562.)

Second, the case had been in progress a long time; and it would be unfair to defendants to subject them to the delay necessary to obtain new counsel. R. 1619-20. (The delay requested was merely two weeks at most, R. 689, and proposed new counsel promised to be energetic and speedy, R. 695.)

Third, the trial judge was rotating to another bench after October, and a two-week delay would, he said, have "disrupted calendars and assignments into the succeeding months." R. 1620; see also R. 696. (Mr.

Haydon responded that he was willing to devote 24 hours a day, gratis, to orient new counsel, in an effort to speed disposition. R. 701. Mr. Schultz in the consolidated case thought that with diligence the cases could be finished before the judge rotated. R. 705.)

Fourth, there was already counsel in the consolidated action. R. 1618, 1620. (Actually, a few days after the trial began, a new attorney, Mr. Schultz, entered the other case, R. 668; he was unfamiliar with it, and relied on Mr. Haydon for orientation. R. 674. He did not consider the two actions to be one, nor himself to be involved in petitioner's action. R. 703-4.)

The court stated that the bad relation with counsel was inferrably not without fault on petitioner's part; that some phases of the present case had been litigated earlier; that petitioner had had many attorneys before; that petitioner had some legal training; and that he had "assumed general direction of the litigation on his own account." R. 1622-23.

Having thus disposed of the denial-of-counsel issue, the court decided the merits against petitioner. R. 1623.

After unsuccessfully seeking relief through proper channels to the highest court of New York, petitioner now seeks review in this Court of the New York courts' determinations that there was no denial of due process under the Federal Constitution.

THE FEDERAL QUESTION: HOW RAISED AND PRESERVED

The essence of the federal question was raised at trial, when petitioner repeatedly protested against the denial of the right to counsel. See especially R. 1002, and 1373, where petitioner stated:

"I am making a public declaration on constitutional rights that it is impossible to prosecute this case under the present set of circumstances."

And, ". . . I am, I believe, in a position that the Constitution would not like to see any citizen in, or the courts."

Concededly the due process clause of the Fourteenth Amendment was not expressly invoked by petitioner, a layman; but petitioner, against his will, was without counsel at the time, and hence could hardly be charged with having to claim his rights in more precise legal terminology at that time. In any case, the trial court knew the denial-of-counsel issue was in the case, and discussed it in its opinion.

As soon as he had a chance to engage counsel, petitioner raised the federal question at every stage of the proceeding; see Point III, pages 25-32 of petitioner's brief before the Appellate Division, and Points III, IV and V, pp. 56-70, of petitioner's printed brief on motion for leave to appeal to the Court of Appeals, and pp. 15-22 of his typed Affidavit in Opposition before the same court on motion to dismiss his constitutional appeal. Relief was denied at all stages without opinion,* and so there was, of course, no express ruling on the federal question raised. But since the question was raised, denial of relief was necessarily a determination that petitioner's rights under the federal constitution had not been violated.

Thus, the federal question was raised at trial, and preserved subsequently, to the maximum extent pos-

*In dismissing petitioner's constitutional appeal, the Court of Appeals stated merely ". . . upon the ground that no substantial constitutional question is directly involved."

sible under the circumstances, and is eligible for review by this Court.

REASONS FOR GRANTING THE WRIT

Up to the present time, this Court has never held that an ordinary citizen is entitled as a matter of constitutional right to counsel in a state civil proceeding. In the federal courts, the right is plain. The Sixth Amendment guarantees this right to a criminal defendant,[1] and the right to counsel has been extended to a defendant in a federal contempt proceeding,[2] and to an alien in a deportation proceeding.[3] Federal statute recognizes that a party in any federal court, civil or criminal, has the right to counsel.[4] Even litigants in a federal administrative proceeding have the right to counsel, if not as part of the constitutional right to a fair hearing,[5] then by statute.[6] Under the Due Process Clause of the Fourteenth Amendment, the right to counsel has been extended to state criminal defendants,

[1] The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

[2] *Cooke* v. *United States*, 267 U.S. 517 (1925).

[3] See *Ex parte Chin Loy You*, 223 Fed. 833 (D.Mass. 1915); *Powell* v. *Alabama*, 287 U.S. 45 (1932), at pp. 69-70.

[4] "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel, as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." 28 U.S.C. § 1654.

[5] *Cf. Wong Yang Sung* v. *McGrath*, 339 U.S. 33 (1950).

[6] The Administrative Procedure Act, 5 U.S.C. § 1006(a) states: "Every party shall be accorded the right to appear in person or by or with counsel or other duly qualified representative in any agency proceeding."

at first to capital cases,[7] and later to other criminal cases.[8] One court has held that due process guarantees the right to counsel in a state civil proceeding, where the litigant was an Indian.[9] The major gap, not yet determined by this Court, is whether a similar right obtains to an ordinary citizen in a state civil trial.

The declaration which petitioner would have applied to a civil case appears in *Powell* v. *Alabama*,[10] a criminal case:

> "It has never been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps essential to the passing of an enforceable judgment, and that they . . . constitute basic elements of the constitutional requirements of due process of law. . . .
>
> "What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law . . . *If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reason-*

[7] *Powell* v. *Alabama*, 287 U.S. 45 (1932).

[8] *E.g.*, *House* v. *Mayo*, 324 U.S. 42, 46 (1945); *Chandler* v. *Fretag*, 348 U.S. 3 (1954).

[9] *Roberts* v. *Anderson*, 66 F.2d 874 (10th Cir. 1933), which held void a state civil proceeding in which the Indian's attorney had not been allowed to appear generally, and the court appointed another attorney not chosen by the Indian, to represent the Indian.

[10] 287 U.S. 45 at 68-69.

ably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense." (Emphasis added.)

Assuming that a civil litigant does have the right to counsel, and that denial thereof would constitute a denial of due process, then was that right denied here? It is difficult to conclude otherwise. Mr. Haydon, who was petitioner's counsel until he sought to withdraw, remained at trial, under protest, only because the court ordered him to do so. R. 697. He did not assist petitioner, and frankly so conceded.[11] He refused to speak to petitioner. R. 671, 1003, 1562. He warned the court that it was committing reversible error. R. 698, 699.

The farce was not petitioner's fault; petitioner was willing that Mr. Haydon remain on. R. 675, at least until the sham trial had dragged on for two more days, when petitioner finally told Mr. Haydon by telegram he need do nothing further. R. 983, 986. The record does not even show to what extent, if at all, the original disagreement between petitioner and Mr. Haydon was petitioner's fault.

Petitioner made a reasonable attempt to secure new counsel, but when new counsel appeared, he was turned away by the court's refusal to grant a reasonable continuance. R. 689; 705, 706. The excuses given by the trial court for his actions may be distilled into one word, "expediency." Due process cannot be made to depend on the court's convenience (disruption of calendars and assignments, or rotation of the judge); the right to counsel is an empty one if new counsel is unable to proceed save, because of arbitrary limitations of time, in ignorance of the case.

[11] He refused to cross-examine witnesses. R. 1038. He said he was merely a "spectator." R. 1213.

If it be necessary to show prejudice,[12] prejudice was plain: As is shown by the length of the record, and the roster of parties, this was a complicated trial. Petitioner's rights on the merits, whatever they were, lay deeply enmeshed in the intricacies of real-property and contract law. There were numerous interconnected legal relations among the parties. There were issues of credibility calling for skilled cross-examination. His property was at stake, yet he was forced to face, alone, the attorneys on the opposite side. On these facts, the absence of counsel was necessarily prejudicial, and perhaps fatal.

CONCLUSION

The petition should be granted.

Respectfully submitted,

GEORGE J. SCHAEFER, ESQ.
Counsel for Petitioner

JOHN W. CRAGUN
Of Counsel

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[12] In *Glasser* v. *United States*, 315 U.S. 60 (1942), a criminal case, the defendant was an attorney who was represented by two other attorneys. The trial court required one of defendant's attorneys to extend his representation to a co-defendant. This Court held that defendant's right to counsel had been denied; it said under these circumstances it was difficult to determine the precise degree of prejudice to defendant, but that that was unnecessary. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." P. 76. The *Glasser* case also repudiates any notion that representation of some other party constitutes, to any degree, the representation to which the party is entitled; for if entitled at all, the party is entitled to the *effective* assistance of counsel.

Cf. also *Roberts* v. *Anderson*, note 9 above, a civil case where the Indian party (when the case was in the state court) was required to subordinate her own attorney to another attorney appointed by the court. The federal court held the state proceeding void because infected by denial of counsel.

APPENDIX A

[caption]

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the third day of March A.D. 1960.

Motions having heretofore been made upon the part of the respondents to dismiss the appeals taken by the appellant in Action No. 1 to this Court and after having heard Robert E. Lawther, Esq., and Denis G. McInerney, Esq., in support of said motions and George J. Schaefer, Esq., in oppositon thereto and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeals dismissed upon the ground that no substantial constitutional question is directly involved.

/s/ Gearon Kimball
Deputy Clerk

APPENDIX B

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the thirtieth day of December A.D. 1959.

[caption]

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellant in Action No. 1 and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars cost and necessary printing disbursements.

/s/ Gearon Kimball
Deputy Clerk

APPENDIX C

At a Term of the Appellate Division of the Supreme Court of the State of New York held in and for the Second Judicial Department at the Borough of Brooklyn, on the 28th day of July, 1959.

[caption]

The above named Michael P. Grace, II, individually and as Trustee under the Last Will and Testament of Janet Grace, deceased, the plaintiff in the above entitled Action No. 1, and the above named Corinne Grace, as Guardian ad Litem for Michael P. Grace, Jr., an infant, the plaintiff in the above entitled Action No. 2 of these consolidated actions, having appealed to the Appellate Division of the Supreme Court from a judgment of the Supreme Court entered in the office of the Clerk of the County of Nassau on the 3rd day of April, 1958, after trial before the court without a jury (1) declaring a contract of sale dated May 6, 1955 to be valid; (2) dismissing, upon the merits, the complaints of both said plaintiffs, and (3) directing specific performance of the contract, and the said appeals having been argued by Mr. James E. Birdsall, of counsel for appellant Michael P. Grace, II, individually and as Trustee, etc. in Action No. 1; and submitted by Mr. John P. Boland, respondent, Guardian ad Litem for Janet Maureen Grace in Action No. 1; and argued by Mr. Robert E. Lawther, of counsel for respondent Grace National Bank as Committee of Janet Maureen Grace in Action No. 1; and argued by Mr. Denis G. McInerney, of counsel for respondents Charles MacDonald Grace and Joseph P. Grace, Jr., individually and as Trustees, etc. in Action No. 1; and argued by Mr. George J. Schafer, of counsel for appellant Corinne Grace, as Guardian ad Litem for Michael P. Grace, Jr., an infant, in Action No. 2; and argued by Mr. Arthur Mermin, of counsel for respondents Joseph P. Grace, Jr. and Charles MacDonald Grace, as Trustees, etc. in action No. 2; and

argued by Mr. Charles F. McGuire, of counsel for respondent Real Property Owners, Inc. in Action No. 2, and due deliberation having been had thereon; and upon the opinion and decision slip of the court herein, heretofore filed:

It is Ordered and Adjudged that the judgment so appealed from be and the same hereby is unanimously affirmed, with costs to all respondents filing briefs, payable personally by the appellant in Action No. 1.

Enter,

JOHN J. CALLAHAN,
Clerk.

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JAMES R. BROWNING, Clerk

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT JOHN P. BOLAND, *GUARDIAN AD LITEM* FOR JANET MAUREEN GRACE, AN INCOMPETENT PERSON, IN OPPOSITION

JOHN P. BOLAND, *Guardian ad Litem*
for Janet Maureen Grace,
an Incompetent Person,
Respondent *Pro Se*

IN THE

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENT JOHN P. BOLAND, *GUARDIAN AD LITEM* FOR JANET MAUREEN GRACE, AN INCOMPETENT PERSON, IN OPPOSITION

The respondent, John P. Boland, *Guardian ad Litem* for Janet Maureen Grace, prays for an order denying petitioner's application for a writ of certiorari to review a

final judgment in the above matter in the Supreme Court, State of New York, for the County of Nassau, dated November 4, 1959, affirmed by the Appellate Division, Second Department of the Supreme Court of the State of New York, as to which leave to appeal was denied by both the Appellate Division and the Court of Appeals of the State of New York. An appeal as of right was dismissed by the Court of Appeals of the State of New York, "upon the ground that no substantial constitutional question is directly involved".

Opinions Below

The opinion of the trial court is set forth in Volume II of the Record at pages 1599 to 1625 and is reported in 9 Misc. 2d 538. The affirmance of the judgment below by the Appellate Division was without opinion, and the Court of Appeals' denial of leave to appeal as well as its dismissal of petitioner's appeal as of right were also without opinion.

Statement

The trial of this action was commenced on October 8, 1957. On the morning of October 15, after five days of trial, Charles Haydon, Esq., petitioner's counsel, informed the Court that he and associate counsel had had a "very disagreeable conference" with the petitioner the preceding evening and that petitioner had made such charges against counsel that neither he (Haydon) nor his associate firm could in good conscience continue to represent the petitioner (R. 669). Mr. Haydon asked for leave to withdraw as counsel for the petitioner (R. 669). The trial judge reserved decision on Mr. Haydon's application to withdraw and granted petitioner (who was present in court) a six-day adjournment with the advice, "that if other counsel were prepared to go forward on the adjourned date Mr. Haydon would be relieved but otherwise he would be re-

quired to go forward with the case and continue as counsel for petitioner" (R. 685).

On October 21, the adjourned date, petitioner appeared with other counsel and requested a further adjournment of two weeks (R. 689). After argument, the Court denied the request and directed that the trial go forward (R. 697). The Court then instructed Mr. Haydon that he was not relieved as counsel for petitioner but would stay in the case until such time as new counsel might take over petitioner's representation in full (R. 697). After a short recess and conference by petitioner and his attorneys, new counsel declined to appear and pursuant to the Court's direction, the trial was continued with Mr. Haydon as petitioner's counsel (R. 706). Mr. Haydon continued to present the petitioner's case thoroughly and well until the morning of October 27 when the Court and counsel for some of the respondents were handed identical telegrams from the petitioner (R. 980) which began:

> "Bernstein & O'Dwyer through Charles Haydon have fought this case with unquestionable zeal and skill".

The telegrams concluded in part:

> "After a deposition from me, I authorize the proper authorities whoever they may be to discontinue this trial * * *". (R. 2027)

Thereafter, the petitioner in open court personally requested Mr. Haydon to put in no further evidence but to rest petitioner's case (R. 987). Mr. Haydon acceded to the request, and petitioner's case was rested (R. 987). Mr. Haydon, as the trial court observed, remained throughout the balance of the trial ready to examine witnesses and to proceed except for the fact that the petitioner had requested him not to do so (R. 1622).

Thereafter, at the close of the case, the Trial Court dismissed petitioner's case and granted judgment in favor of the respondents (R. 1623).

Question

The question presented is not as stated in the petition. Rather it is:

> In a trial of a civil action in a State Court, is it a denial of due process under the Fourteenth Amendment for the Trial Court, after having already granted a party to the action a delay of six (6) days for the purpose of obtaining new counsel, to refuse an additional adjournment of two weeks for new counsel to prepare?

Argument

Petitioner was not denied counsel or the right to counsel. At his request, he was granted six (6) days delay in the middle of trial to obtain new counsel with the emphatic admonition that no further delay would be permitted. The Trial Court adhered to its ruling.

A hearing or an opportunity to be heard before judgment with full opportunity to present all the evidence and arguments which the party deems important is all that can be adjudged vital under the guarantee of due process of law under the Fourteenth Amendment.

Petitioner has had his day in Court. He is entitled to nothing more.

CONCLUSION

The petition should be denied.

Respectfully submitted,

JOHN P. BOLAND, *Guardian ad Litem*
for Janet Maureen Grace,
an Incompetent Person,
Respondent *Pro Se.*

FILE COPY

No. 853

FILED
MAY
JAMES R. BR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

MICHAEL P. GRACE, II, individually and as a Trustee under the Last Will and Testament of JANET GRACE,

Plaintiff-Petitioner,

against

TUCKAHOE, INC., REAL PROPERTY OWNERS, INC., GRACE NATIONAL BANK OF NEW YORK, GRACE PROPERTIES, INC., in Liquidation and ALBERT J. BORGUNSEN, Jr.,

Defendants,

COMMITTEE OF JANET MAUREEN GRACE, [illegible] National Bank of New York and Michael P. Grace II, [illegible] CHARLES MacDONALD GRACE, individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, JOSEPH P. GRACE, JR., individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, and JOHN P. BOLAND, [illegible] JANET MAUREEN GRACE,

Defendants-Respondents.

COMMITTEE'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

[illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 853

MICHAEL P. GRACE, II, individually and as a Trustee under the Last Will and Testament of JANET GRACE,
Plaintiff-Petitioner,

against

DEEPDALE, INC., REAL PROPERTY OWNERS, INC., GRACE NATIONAL BANK OF NEW YORK, GRACE PROPERTIES, INC., in Liquidation and ALBERT JORGENSEN,
Defendants,

COMMITTEE OF JANET MAUREEN GRACE, by Grace National Bank of New York and Michael P. Grace, II, its members, CHARLES MACDONALD GRACE, individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, JOSEPH P. GRACE, JR., individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, and JOHN P. BOLAND, Guardian ad Litem for JANET MAUREEN GRACE,
Defendants-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

COMMITTEE'S BRIEF IN OPPOSITION

Grace National Bank of New York is the committee of the property of Janet Maureen Grace, an incompetent person. The petitioner, Michael P. Grace, II, a co-member

of the committee when he began this action, has since been removed therefrom. In spite of the fact that a guardian ad litem was appointed herein for the same incompetent person, the committee was named and continued as a defendant to the action and is made a respondent in this court.

The committee asks the court to deny the writ.

Questions Presented

1. Where a litigant complains of a court's denial of his application for an adjournment in the midst of the trial of a civil action, is a federal question properly raised when the first vague mention of "constitutional rights" is made on the third trial day after the ruling, the reference is not related by the litigant to the previous ruling, and the request for adjournment is never renewed?

2. When a plaintiff in a civil action has so abused his trial counsel as to cause such counsel to decline further to confer with his client, is due process of law denied the plaintiff by the refusal of a trial court to adjourn the trial for an additional two weeks to allow the plaintiff to substitute and prepare other counsel after the plaintiff had already been given six days for that very purpose?

3. Regardless of the correctness of the ruling of the trial court, will this court grant certiorari to review a case in which the petitioner is precluded from being granted the only relief prayed for in his complaint by having himself failed to perfect an appeal against a necessary party?

Statement

The petitioner, his two brothers and his incompetent sister became co-owners of a large Long Island estate at the death of their father. For a brochure describing the

property, see Plf. Ex. 4, R. 1642. Five years ago, the co-owners entered into a contract for the sale of the property to a corporate purchaser for conversion into an eighteen-hole golf course (R. 20).

As required by law, the bank applied to the New York Supreme Court for approval of the sale in respect of the interest of the incompetent, the contract having been signed by both the bank and the petitioner in her behalf and by the latter also individually and as a trustee. The petitioner as co-committeeman refused to join in the application for approval and was made a respondent. Purporting to have come to the conclusion that the price was inadequate and alleging that he had been the victim of a conspiracy among his brothers, the purchaser and others to defraud him, the petitioner appeared and opposed court approval. After a lengthy trial of the fraud issue, the Supreme Court, Nassau County, found that there had been no fraud and that the contract was in the incompetent's best interests and ordered its consummation. This order was appealed by this petitioner to the Appellate Division of the Supreme Court and to the New York Court of Appeals. Both courts affirmed. For having contumaciously refused thereafter to close the contract and to join in a fiduciary deed to the interest of his incompetent sister, the petitioner was summarily removed from the committee of her property. The bank then closed and the incompetent received her share of the price.

The other co-owners voluntarily carried out the contract. The petitioner, while continuing to live rent-free in the 44-room mansion on the premises (R. 1352), brought a new action, the case at Bar, to set aside the contract on the ground that it had been induced by fraud, the same alleged fraudulent conspiracy which had been found non-existent in the incompetency proceedings above described.

As defendants, he joined his brothers, the contract purchaser and others. Although making no charge of fraud against his incompetent sister, nor against the committee of her property as such, nevertheless the committee was also

joined as a defendant, and the petitioner likewise obtained the appointment of a guardian ad litem to represent the incompetent. The case was tried in the same court as the prior proceeding, before a different judge.

At the opening of court on the fifth day of the trial of this action, the petitioner's counsel informed the court that his client had so treated him in a conference on the preceding evening that, as an attorney, he could no longer confer with the petitioner and he asked to be excused (R. 678). The petitioner declined to discharge his counsel, and the court refused to permit the attorney to withdraw but adjourned the trial for six days in order to permit the petitioner either to settle his differences with his counsel or to obtain substitute counsel, an action which the petitioner characterized as "very helpful" (R. 679). He was advised that the trial would proceed following the six-day adjournment.

Six days later, the petitioner appeared with two new attorneys who announced that they would take over presentation of the case, if granted an additional two weeks adjournment of the trial further to prepare. The court refused the additional adjournment and the new attorneys withdrew. It is this ruling by which the petitioner now claims he was deprived of due process of law as vouchsafed him under the Fourteenth Amendment to the United States Constitution.

The petitioner again declined to discharge his original trial counsel who proceeded to present petitioner's evidence on that day, all the next day and until noon of the third day, when the petitioner, although present in court, had a telegram delivered in open court to the judge, to his counsel and to some of the other attorneys (R. 982). The telegram starts with an admission that his attorneys, through his trial counsel, had "fought this case with unquestionable zeal and skill." Court's Ex. K, R. 2027. The rest is superficially incoherent but was intended as a direction to his trial counsel to rest his case (R. 987).

The trial proceeded, with both the petitioner and his original trial counsel in attendance. Judgment was rendered dismissing the complaint as to all defendants and granting

the contract purchaser's counter-claim against the petitioner for specific performance.

On May 7, 1958, the petitioner served and filed a timely notice of appeal from the judgment upon certain of the defendants, but *not* upon the contract purchaser. After his time to appeal had expired, the petitioner served another purported notice of appeal, this time including as an appellee the contract purchaser. Petitioner made application to the Appellate Division of the New York Supreme Court to "correct" his original notice of appeal to include the purchaser, and his application was denied. The purchaser then applied to the same court to dismiss the tardy, purported appeal. The purchaser's application was granted and the petitioner's purported appeal dismissed. These two sets of motion papers and the consequent orders of the Appellate Division are filed in this court on behalf of the committee as additions to the record filed by the petitioner.

Summary

The committee respectfully submits (a) that a litigant has no federal right to the adjournment of a civil trial in a state court in order to substitute counsel when he had quarreled with his orginal attorney, (b) that, if there were such a right, neither this petitioner nor any of his three attorneys then present in court, claimed it, and (c) that, in any event, the case, which is one to rescind a contract of sale, is rendered moot by the fact that the judgment is final and not reviewable in favor of the contract purchaser because of the failure of the petitioner to perfect an appeal as to such purchaser. The only persons left and before this court are covendors.

No Federal Question Was Decided

The Court of Appeals, State of New York, dismissed the appeal below "upon the ground that no substantial constitutional question is directly involved." App. A. to Pet., p. 1 a.

Mr. Justice Harlan granted a few days extension of time to file the petition for a writ, with a memorandum which said that he did so "despite my view that petitioner's papers disclose no federal question of substance."

Since the justice reached the above conclusion on petitioner's papers alone, no briefs in opposition to the extension having been filed, the court may wonder why it is now burdened by opposing briefs. The reason is that the petition is so inaccurate as to create a danger that it is misleading.

The case does not have in it what the petition calls a "denial-of-counsel issue." The only ruling of which the petitioner has complained or could complain is that the trial judge denied his application for a two-week adjournment in the middle of the trial to prepare attorneys which he wished to substitute for his original trial counsel so that the new lawyers might continue presentation of his case. The petitioner had quarreled with his lawyer; the court had already given him six days to secure other counsel and to proceed. When his new attorneys were refused the additional two-week adjournment and withdrew, the petitioner chose not to substitute other counsel at any time during the course of the trial, which was not concluded for another nine days, nor did he discharge his original counsel. Under such circumstances, the court refused to grant his original counsel's application to be excused and required his continued attendance in court. Indeed, the original counsel continued "with unquestionable zeal and skill," Court's Ex. K, R. 2027, to present the petitioner's case as plaintiff for some days thereafter, until directed by the petitioner to rest.

The situation was made entirely clear to the petitioner by the trial court while he, himself, was testifying. The occasion was an unimportant remark by counsel to the bank involving custody of an exhibit.

> "The Witness (The Petitioner): I take an exception to that.
>
> The Court: On whose behalf?
>
> The Witness (The Petitioner): On behalf of the witness here, because I have no counsel. I am sure

counsel here would not allow Mr. Lawther to stand up and say I received an original and he is not sure of the honesty of witnesses and several other

The Court: You have had counsel. You had three lawyers since we started here. There are four or five appeared, some of them were a little late, and I never said they could not serve but I simply would not give any further time to delay this case. However, all these lawyers I was perfectly willing to have here. So when you say you have no counsel, there have been plenty of counsel available to you.

The Witness (The Petitioner): I disagree with you, your Honor.

The Court: I know. You have a different view on that.

The Witness (The Petitioner): Reputable counsel have told me they will not come into this case under these circumstances. I have talked to many since your ruling has come down, and they have seen your ruling, and they said they are shocked as officers of the court. And I just talked to a counsel today and he said the only thing you can do is to have to proceed without counsel in a situation like this." (R. 1212-1213).

This Court may some day wish to determine that a plaintiff in a civil action brought in a state court has an absolute right to counsel. It may even wish to determine that such a litigant has an absolute right to change his counsel at will. Neither of these questions could conceivably be determined on this record.

There would appear to be absolutely nothing to justify the assumption by the petitioner and his counsel that this court should be asked to intervene in petitioner's over-litigated disagreements with his family over the price at which to sell the estate of their parents.

No Federal Question Was Raised

The ruling by the New York Supreme Court at *nisi prius* denying the petitioner's application for the additional two-week adjournment was made in the morning of October

21, 1957 (R. 706, Pet. 5). The petition cites only two pages of the Record in support of a statement that the alleged federal question was properly raised (R. 1002 and R. 1373, Pet. 8, 9). The first reference is to a statement made by the petitioner in open court on the afternoon of October 23rd. The second reference is to a statement made by him on the afternoon of October 28th. In attempting to excuse the presumably otherwise fatal imprecision of these statements, which, of course, make no reference at all to the Constitution of the United States, even in general, as distinct from the Constitution of the State of New York, the petition speaks of the petitioner as being "against his will, without counsel at the time" (Pet. 9).

Of course the only time to have raised a question, federal or otherwise, with respect to the adjournment was at the time the ruling was made, and, as will be shown, arguments addressed to the court's discretion *were* then made. The trial, however, continued throughout October 21st and 22nd and until the afternoon of October 23rd before the first alleged "raising" of an alleged "federal question" took place and then the trial continued on every business day thereafter until October 28th in the afternoon before the second such alleged "raising" took place. At no time other than at the opening of court on October 21st did the petitioner or anyone on his behalf renew the application for an adjournment of the trial in order that the petitioner might prepare substitute counsel.

On October 21st, not only was the petitioner present in court, in person, but he was far from being "without counsel at the time." The petitioner was represented by his original trial counsel, Mr. Charles Haydon for the firm of O'Dwyer & Bernstein, who took exception to the Judge's ruling and argued at length against it (R. 697-701). He was likewise represented by and there were present in court two other distinguished members of the New York bar, Mr. Charles Poletti, former Justice of the New York Supreme Court and former Governor of that State, and Mr. Ben Herzberg of the firm of Hays, Sklar & Herzberg. Both of these latter

had read the preliminary discussion with respect to substituting counsel and were in court especially to make the petitioner's application for the adjournment. Mr. Poletti, assisted by Mr. Herzberg, did so move and argued the point at length (R. 688-690, 694-695). It was not until after the court had made its ruling and after all three of Mr. Grace's attorneys had been given a special recess to confer with one another, that Messrs. Poletti and Herzberg withdrew and the trial proceeded (R. 706). Neither Michael Grace, *pro se*, nor any one of his three attorneys, all then present in court, objected to the court's ruling on the ground that it violated the Constitution of the United States in general or any specific provision thereof.

There is not a word in the opinion of Mr. Justice Marcus G. Christ, Supreme Court, Nassau County, New York (R. 1599-1625), indicating that he at any time considered that, on this or on any other ruling, the petitioner or anyone on his behalf had raised an issue arising out of the due process clause of the Fourteenth Amendment to the Constitution of the United States. The Appellate Division affirmed without opinion and the New York Court of Appeals dismissed the appeal finding "no substantial constitutional question * * * directly involved."

The Case is Moot

Petitioner did not perfect an appeal from the judgment dismissing his complaint *as against the purchaser* and awarding the purchaser specific performance. He has before this court only co-sellers with him. It is submitted as axiomatic that you may not rescind a contract in an action to which the sole purchaser is no longer a party. Whatever action this court might take if it were to review, the petitioner has precluded himself from obtaining the only relief which he has at any time claimed, viz., rescission of the contract. In consequence, not even petitioner's narrow self-interest could possibly be advanced by the granting of the writ.

Conclusion

Wherefore, the committee asks that the petition for a writ of certiorari be denied.

Dated: New York, N. Y.
May 23, 1960

Respectfully submitted,

ROBERT E. LAWTHER,
Counsel for Respondent,
Grace National Bank of New York, as Committee of the Property of Janet Maureen Grace, an incompetent person,
11 Broadway,
New York 4, N. Y.

FILE COPY

FILED
MAR 25
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 853.

MICHAEL P. GRACE, II, individually and as a Trustee under the Last Will and Testament of JANET GRACE,

Petitioner,

against

DEEPDALE, INC., REAL PROPERTY OWNERS, INC., GRACE NATIONAL BANK OF NEW YORK, GRACE PROPERTIES, INC., in Liquidation, ALBERT JORGENSEN, COMMITTEE OF JANET MAUREEN GRACE, by Grace National Bank of New York and Michael P. Grace, II, its members, CHARLES MACDONALD GRACE, individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, JOSEPH P. GRACE, JR., individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, and JOHN P. BOLAND, *Guardian ad Litem* for JANET MAUREEN GRACE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS JOSEPH P. GRACE, JR. AND CHARLES MACDONALD GRACE IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 853.

MICHAEL P. GRACE, II, individually and as a Trustee under the Last Will and Testament of JANET GRACE,

Petitioner,

against

DEEPDALE, INC., REAL PROPERTY OWNERS, INC., GRACE NATIONAL BANK OF NEW YORK, GRACE PROPERTIES, INC., in Liquidation, ALBERT JORGENSEN, COMMITTEE OF JANET MAUREEN GRACE, by Grace National Bank of New York and Michael P. Grace, II, its members, CHARLES MACDONALD GRACE, individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, JOSEPH P. GRACE, JR., individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, and JOHN P. BOLAND, *Guardian ad Litem* for JANET MAUREEN GRACE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE STATE OF NEW YORK.

BRIEF FOR RESPONDENTS JOSEPH P. GRACE, Jr. AND CHARLES MacDONALD GRACE IN OPPOSITION.

Respondents Joseph P. Grace, Jr. and Charles MacDonald Grace (hereinafter called "respondents") respectfully submit that the instant record does not raise any

question worthy of review by this Court, or indeed any federal question whatever, and that this petition for certiorari should accordingly be denied.

Opinion Below.

The trial court's opinion is reported at 9 Misc. 2d 538, 169 N. Y. S. 2d 287 (Sup. Ct., Nass. Co., 1957), and the portion thereof here relevant is reprinted as Appendix A hereto. That decision was unanimously affirmed by the Appellate Division without opinion, 8 App. Div. 2d 965, 191 N. Y. S. 2d 148 (2d Dep't 1959). Motions by petitioner for leave to appeal to the New York Court of Appeals were denied without opinion both by the Appellate Division and the Court of Appeals, 9 App. Div. 2d 682, 192 N. Y. S. 2d 490 (2d Dep't 1959), 7 N. Y. 2d 708 (1959). Thereafter, the Court of Appeals dismissed an appeal, purportedly taken by petitioner as of right, on the ground that "no substantial constitutional question is directly involved", 7 N. Y. 2d 987 (1960), Appendix A to the petition.

Jurisdiction.

Petitioner asserts that this Court has jurisdiction under 28 U. S. C. § 1257(3). Respondents submit that the Court has no jurisdiction because no federal question is involved.

Question Presented.

Does the due process clause of the Fourteenth Amendment guarantee petitioner, under the circumstances in this state civil action, an absolute right to a two-week adjournment in the middle of trial for the purpose of substituting

counsel, so that the trial court had no discretion in the matter?

That is the only question petitioner can properly raise on this record.

Statement of the Case.

Petitioner brought this action for the purpose of rescinding, on the ground of fraud, a written contract for the sale of certain real property in which petitioner, these respondents (petitioner's brothers) and their sister held interests. Two tracts of land (known as "Tullaroan" and "Arthur Farm") were to be conveyed under this contract. Tullaroan was owned in equal one fourth shares by the three brothers and their sister (an incompetent who was then represented by a committee consisting of petitioner and defendant Grace National Bank of New York); the other tract, Arthur Farm, was held in a trust administered by petitioner and respondents as trustees.

The contract of sale was signed by petitioner in each of his three capacities (R. 1606) and resulted, as the trial court found, largely from petitioner's own negotiations (R. 1608). The purchaser was defendant Real Property Owners, Inc., a holding company for defendant Beekdale, Inc. Included in the sale was a 48 room mansion at Tullaroan where petitioner and his wife, Corinne Grace, resided.

Because time was of the essence, the purchaser was permitted to start improving the property before title passed, but the contract provided that the sellers would retain the benefit of such improvements if the contract were judicially disapproved thereafter. The purchaser had improved the property substantially, at a cost of over $400,000, before petitioner reversed his position and began his campaign to obtain such judicial disapproval (R. 1624).

In the course of that campaign petitioner attacked the contract of sale, on substantially the same grounds as those he urged in the instant case, in a proceeding by the bank to obtain court approval for conveyance of the incompetent's interest. As a result, fourteen days of hearings were held before a referee, who rejected petitioner's charges and reported that the contract was in the best interest of the incompetent. This report was confirmed by the Supreme Court, Nassau County. *In the Matter of the Application of Grace National Bank of New York*, N. Y. L. J., April 17, 1956, p. 13, col. 6, *aff'd* 2 App. Div. 2d 222, 154 N. Y. S. 2d 657 (2d Dep't 1956), *aff'd*, 2 N. Y. 2d 822, 140 N. E. 2d 748 (1957).

Petitioner was then ordered to join the bank in conveying the interest of the incompetent. N. Y. L. J. March 7, 1957, p. 11, col. 4, *aff'd*, 4 App. Div. 2d 783, 165 N. Y. S. 2d 715 (2d Dep't 1957). When he refused to do so, he was removed as a member of the committee. N. Y. L. J. April 26, 1957, p. 12, col. 6, *aff'd*, 4 App. Div. 2d 874, 167 N. Y. S. 2d 240 (2d Dep't 1957), motions for reargument and for leave to appeal denied, 4 App. Div. 2d 964, 168 N. Y. S. 2d 611 (2d Dep't 1957).

Petitioner commenced this action in New York County on August 16, 1956, shortly after his wife (as guardian *ad litem* for their infant son, who had a remainder interest in the Arthur Farm trust) had commenced the companion case in Nassau County. She attacked the same contract of sale on similar grounds, and named as defendants the three trustees (petitioner and respondents) and Real Property Owners, Inc. Both actions were consolidated for trial in Nassau County. *Grace* v. *Decipdale, Inc.*, 3 App. Div. 2d 397, 160 N. Y. S. 2d 598 (1st Dep't 1957).

Throughout these proceedings, petitioner and his wife continued on as holdover (and rent-free, R. 1352, 1621)

tenants of Tullaroan mansion. They were not ousted until almost three years after the original closing date. *Grace v. Deepdale, Inc.*, 7 App. Div. 2d 753, 181 N. Y. S. 2d 768 (2d Dep't 1958), motion for leave to appeal denied, 7 App. Div. 2d 867, 182 N. Y. S. 2d 303 (2d Dep't 1959).

Commencement of the trial of this action was repeatedly adjourned at the request of counsel for petitioner and his wife (R. 455, 669). The day before the trial actually commenced, petitioner requested a further adjournment on the ground that he had just retained new counsel to represent him as a defendant in his wife's action (R. 450). Since petitioner had been represented previously in that action by three successive firms of attorneys, and was, nonetheless over a year in default in answering his wife's complaint, the trial court refused that adjournment, and the trial commenced the following day (R. 451).

On the third day of trial, when the first witness was excused, petitioner sought to obtain a mistrial through Corinne Grace's counsel (R. 460). Her attorney moved for a mistrial on the ground that petitioner's rights, in his capacity as a defendant in her action, were prejudiced by the court's refusal to delay the discharge of witnesses pending petitioner's obtaining still another lawyer to represent him in that capacity (R. 458). The court denied that motion, observing (R. 459) that it might have come with better grace from petitioner's counsel in the instant action (Charles Haydon, Esq., for the firm of O'Dwyer & Bernstein). The next day, another lawyer took over as trial attorney for Corinne Grace (R. 641).

At the opening of court the following morning, Mr. Haydon informed the trial judge that he and Mr. Bernstein had had "a very disagreeable conference" with petitioner and his wife the preceding evening, as a result of which

they wished to withdraw as petitioner's attorneys (R. 669). He stated in part:

> "Mr. Haydon: • • • I hesitate to put on the record the things that were said, your Honor; but you must take my word that these things were such that no lawyer could possibly go on under these circumstances. • • •
>
> "The Court: The thing that troubles me is that this matter has been pending and you have the property, that is, Mr. Grace [petitioner] has the property tied up. These people sought to have it determined last June and last May. Now here we are in October and there should not be any further delay. • • •
>
> "Mr. Haydon: • • • I do not think that this week's trial should be cast aside, but I do feel that Mr. Grace under the circumstances should have at least a day to get someone who can represent him and against whom he does not make the charges that are made here" (R. 669-70).

Petitioner insisted that he had not discharged his attorneys, but had only a dispute with them as to "policy" in conducting the trial (R. 675). The court refused to inquire into that conversation, which Mr. Grace claimed was privileged (R. 683), for fear that "ultimately, if Mr. Grace should not prevail, he might have a feeling that that side talk had a deleterious effect upon his case" (R. 678).

Mr. Haydon then stated:

> "• • • I ask your Honor to take my word that no lawyer—no lawyer—who has been told the things I was told last night, and Mr. Oscar Bernstein, the head of this firm, was told would spend five more minutes in this case" (R. 678-79).

Following further colloquy, petitioner was granted a six-day adjournment on the following terms:

> **"The Court: Mr. Grace, the case is over until Monday morning. I will not grant any further adjournments on Monday morning. You will either proceed with it, with this counsel or with new counsel. I will not take any statements that counsel is not ready.**
>
> **"Mr. Michael Grace: Yes, your Honor" (R. 686).**

However, on the adjourned date petitioner appeared with new counsel who requested a two-week further adjournment (R. 689). Up to this point, petitioner and his wife had been represented by over a dozen different attorneys at various stages of their attacks on this same contract of sale (R. 1622) and there was, of course, no assurance as to the tenure of any new counsel. Accordingly, respondents objected to any further delay in having their rights determined. The Court ruled:

> "My order here in this will be, then, Mr. Haydon, that you be required to continue. Counsel who have come in may assist you in the work, but I am not going to release you at this stage and I am going to ask you to stay in the case until such time as counsel who are now employed by Mr. Grace will feel able to take over in full from you. I want to go forward with the matter" (R. 697).

Mr. Haydon protested, stating that he wished to avoid a "humiliating and degrading experience" (R. 701). Nevertheless, when counsel who were to be substituted withdrew, Mr. Haydon continued to present petitioner's case skillfully and thoroughly (R. 1621).

Two days later, during cross examination of a witness called by Mr. Haydon, he received a telegram from petitioner, who was present in court and had also sent similar telegrams to the judge and to counsel for respondents. These began:

> "BERNSTEIN AND O'DWYER THROUGH CHARLES HAYDON HAVE FOUGHT THIS CASE WITH UNQUESTIONABLE ZEAL AND SKILL * * *" (Ct. Ex. K, L, M, R. 2027, emphasis in original).

After criticizing various rulings of the court at some length, they concluded:

> "* * * AFTER A DEPOSITION FROM ME I AUTHORIZE THE PROPER AUTHORITIES WHO EVER THEY MAY BE TO DISCONTINUE THIS TRIAL * * *" (Ct. Ex. K, L, M, R. 2029, emphasis in original).

Petitioner explained orally that he did not wish to go forward, and Mr. Haydon rested his case in compliance with that request (R. 987).

Even then, petitioner was given every opportunity to present his case. He had been using the services of his wife's attorneys throughout the trial, and the court permitted her counsel to elicit testimony with respect to his action (R. 1032). They did so with the assistance of Mr. Haydon and another attorney whom Mr. Grace invited to the trial (R. 1162-63), as well as Mr. Grace himself (R. 1231). Moreover, Mr. Grace, who is not an attorney but has attended three law schools, was permitted to argue *pro se* whenever he so desired, and he took full advantage of this privilege (R. 1192, 1212, 1623).

In short, as the trial court found: "There was every opportunity for Michael Grace to have tried to have had the benefit of counsel and to have presented in full the entire matter which is the subject of this litigation" (R. 1620-21).

ARGUMENT.

It should be clear from the foregoing that the questions which petitioner would have this Court consider are not present here at all. The ruling which petitioner seeks to reverse did not deprive him of any right to counsel, but simply denied his application for a further adjournment for a variety of sound reasons set forth in the court's opinion (Appendix A), which states in part:

> "Whatever motives Michael Grace [petitioner] had for delaying the trial were not fully clear to the court. He has, however, continued to live in the property covered by the contract, substantially rent-free since the contract was signed" (R. 1621).
>
> "The court deemed itself justified in adhering to this position because (1) considerations of fairness to the defendants required it; (2) expedition of the court's business required it; (3) there was counsel actively presenting the case fully against the defendants on behalf of Michael P. Grace, Jr., and (4) it might well be inferred from the long succession of lawyers retained by Michael Grace that his bad relationship with one lawyer after another was not without some fault on his part * * *" (R. 1622).

In his appeal to the Appellate Division, petitioner relied heavily on a contention that Mr. Haydon had become "disabled" to act as his counsel, and that the trial should therefore have been stayed for 30 days pursuant to Section 240 of the New York Civil Practice Act. The Appellate Division unanimously held otherwise, and denied his motion for leave to appeal to the Court of Appeals. Petitioner then asserted that he had a right to such an appeal because the case involved "the Construction of the Constitutions of the United States and the State of New York, and par-

ticularly questions of due process of law thereunder" (Petitioner's notice of appeal to the Court of Appeals, January 4, 1960).[1]

Respondents moved to dismiss that appeal on the ground that the Court of Appeals lacked jurisdiction to entertain it since it did not directly present any substantial question under either constitution. After hearing the same arguments petitioner now urges, the Court of Appeals unanimously dismissed his appeal on the ground that "no substantial [state or federal] constitutional question is directly involved" (Appendix A to petition).

In other words, the Court of Appeals expressly found that there was no need to consider the constitutional question petitioner now seeks to raise. That decision, it is submitted, is a sufficient basis for denying this petition because this Court "must" decline to take jurisdiction where the state court "might" have rested its decision on a non-federal ground. *Ellis* v. *Dixon,* 349 U. S. 458, 459, and cases there cited.

Despite the holdings of all of these state courts, this petition is based entirely on an attempt to convert the trial court's ruling refusing to permit further delay into a denial of counsel. That attempt will not withstand the briefest analysis. As the above statement of facts demonstrates, the record here will not support the petition's efforts to contradict the trial court's factual findings (pp. 7-8), or its gratuitous assertion that "The farce was not petitioner's fault" (p. 12), or the questions concerning "denial of counsel" which the petition seeks to pose (p. 3).

---

[1] Petitioner also asked leave to appeal in the Court of Appeals, but that motion was denied (Appendix B to petition). At that time petitioner argued, among other things, that "This case is *sui generis.*" (Petitioner's notice of motion for leave to appeal, affidavit and brief in the Court of Appeals, November 5, 1959, p. 53). Respondents agree, and submit that this is an additional reason for denying certiorari.

The plain fact is that at no stage of this proceeding was petitioner deprived of any right to counsel, or indeed of any aspect of a fair trial. The court made it clear to petitioner that he could retain any attorney he wished, and be heard through that attorney (R. 686, 1212). Moreover, the trial judge directed Mr. Haydon to remain and assist any new attorney (R. 697) and Mr. Haydon offered to render such assistance without charge (R. 701). In addition, as we have seen, petitioner was effectively represented by Mr. Haydon and by his wife's counsel, not to mention his own objections and arguments *pro se*.

In view of these facts, and of petitioner's persistent attempts to forestall the determination of this action, the trial court's exercise of its inherent discretion to prevent further delay was eminently sound. Any other result would have disregarded the rights of the defendant purchaser (to obtain prompt possession of the Tullaroan property) of respondents (to have their names cleared of these charges of fraud promptly) and of the court (to have the case tried expeditiously and not to have its work disrupted for months as it would otherwise have been).

On this record, petitioner's argument comes down to a contention that he had an absolute right to further delay the trial, and that the trial judge was powerless to control the progress of the proceedings before him. In support of his contention, petitioner cites the Sixth Amendment's guaranty of the right to counsel (to an "accused" in federal "criminal prosecutions") and urges that the court's ruling violated his rights (as plaintiff in a state civil action) under the due process clause of the Fourteenth Amendment.

The authorities upon which petitioner relies to buttress this argument are clearly inapplicable to the instant case. Chief among these is *Powell* v. *Alabama*, 287 U.S. 45, where the majority defined their holding as follows:

> "All that it is necessary now to decide, as we do decide, is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeble mindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; * * *" (p. 71).

While the *Powell* case *dictum* regarding an arbitrary refusal to hear a party by his counsel (quoted at pp. 11-12 of the petition) has no application here in any event, it has apparently been limited in later decisions. *Betts* v. *Brady*, 316 U. S. 455, 463; see also, *Gallegos* v. *Nebraska*, 342 U. S. 55, 64. In *Betts* v. *Brady*, this Court commented as follows upon a contention similar to that advanced in the present petition:

> "* * * indeed, it was said by petitioner's counsel both below and in this court, that as the Fourteenth Amendment extends the protection of due process to property as well as to life and liberty, if we hold with the petitioner, logic would require the furnishing of counsel in civil cases involving property" (p. 473).

Equally far afield are petitioner's references to *Roberts* v. *Anderson*, 66 F. 2d 874 (10th Cir. 1933), and *Glasser* v. *United States*, 315 U. S. 60. In the *Roberts* case, the Tenth Circuit affirmed the District Court's refusal to give full faith and credit to a decision in which a state court had refused to hear counsel selected by one of the parties, and instead arbitrarily forced upon her court-appointed counsel who acted against her interests. *Glasser* v. *United States* was a reversal of a criminal conviction where the defendant was forced to share his attorney with another defendant whose interests conflicted with his. These cases simply

have no bearing on the situation which confronted the trial court in the instant action.

Here, the court gave petitioner ample opportunity to test his claims regarding the validity of this contract, which he has attacked so often and so unsuccessfully. The court's refusal to allow petitioner to delay the trial whenever he wished to do so can afford no basis for certiorari.

Conclusion.

The questions petitioner seeks to raise are without factual basis or legal merit.

The petition should be denied.

Respectfully submitted,

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Dated: May 25, 1960

Appendix.

Relevant Portion of the Trial Court's Opinion, from 9 Misc. 2d 538, 552-56.

MICHAEL GRACE AND HIS LEGAL REPRESENTATION

Because there were certain aspects of the trial of these consolidated actions which the court regards as unusual, it is necessary to comment upon them. These actions were long-delayed in being brought to trial. The contract of sale itself was executed in May, 1955. Michael Grace, as has been earlier pointed out, energetically participated in the negotiations which preceded its final execution, thoroughly examined the instrument, initialled it in numerous places and is a signatory thereto in three separate capacities. After the execution of the contract of sale Michael Grace did his utmost to delay the delivery of the deed and to prevent the approval by the Supreme Court of the sale of the incompetent's interest. When the actions appeared on the calendar for trial they were delayed time after time. They should have been tried in May or June of this year but they went over the summer recess and through the September, 1957 Term and finally came on for trial in October. The dates upon which the actions appeared on the calendar are set forth in the record and they are numerous.

It was known from statements of counsel that the trial of these actions would take almost a full month to complete. Nevertheless, on the opening day of the October Term Edward T. O'Brien, Esq., appeared, asking leave to be substituted as the attorney defending Michael Grace in his capacity of a defendant in Action No. 2 against his son's complaint to have the contract set aside. At that particular juncture he was represented by Charles Haydon, Esq., of counsel for the firm of O'Dwyer & Bernstein, in his capacity as plaintiff in Action No. 1 and at the same time his wife, Corinne Grace, in her capacity as guardian ad litem of the Grace's infant son in Action No. 2, was represented by Arthur H. Rose, Esq.

The court denied an adjournment to enable the proposed incoming attorney to prepare himself for trial. There were two lawyers fully prepared on the same side of the action as Michael Grace stood on, namely, Mr. Haydon and Mr. Rose, and they were both present in the courtroom ready to proceed. After a few days of trial, Mr. Rose retired from active participation in the trial, although he remained as attorney of record. In his place his associate, Louis Schultz, Esq., took over in behalf of Corrine Grace, guardian ad litem of the infant plaintiff, Michael Grace, Jr., in Action No. 2. Later, after the trial had progressed for more than a week, Mr. Haydon, trial counsel for Michael Grace in Action No. 1, came in at the opening of court on a Tuesday morning and asked to be relieved of his obligation to go forward with the case. He stated that the evening before there had been a sharp interchange between Michael Grace on the one hand and Mr. Bernstein and himself on the other and that the things which had been said to Mr. Bernstein and himself by Michael Grace were of such a nature that he, Mr. Haydon, could not go on with the trial. An application was made for an adjournment and, although the court did not relieve Mr. Haydon of his obligation to continue in the case, an adjournment was granted from that Tuesday morning until the following Monday at 10:00 A.M. with the understanding that Mr. Haydon and Michael Grace would settle their differences in the meantime, so that Mr. Haydon would proceed as Michael Grace's counsel or Michael Grace would come to court with new counsel prepared to proceed without further adjournment. Michael Grace did come on the following Monday with new counsel who informed the court that he would take over the prosecution of Action No. 1 on the plaintiff's side provided he was granted a two weeks' adjournment to prepare for that role. This request for an adjournment, in the exercise of the court's discretion, was denied in view of the fact that the case had been in progress for a considerable length of time and because it was the view of the court that it was completely unfair to the defendants, who were blameless, to put them through the expense of delay and the general inconvenience attendant upon such

an adjournment. It was the court's further view that to grant the requested adjournment would seriously upset the routine of the court since the Trial Justice presiding was assigned to Special Term, Part II, for the month of October and it was calculated that this litigation should be disposed of during that period. Had a two weeks' adjournment been granted it would have disrupted calendars and assignments into the succeeding months. Accordingly, the adjournment was denied. Thereupon the prospective substituted attorney withdrew and the court requested Mr. Haydon to continue and he did stay on in the case and prosecuted it until one morning Michael Grace appeared and, in person, asked the court that Mr. Haydon do nothing further, which position he backed up with telegrams which he sent to counsel and the court.

There was available to Michael Grace throughout the full term of the trial the services of the lawyer whom Corinnne Grace had retained on behalf of Michael Grace's son. During the course of all the trial Michael Grace and Corinne Grace attended daily, conferred freely and Michael Grace himself, as the record will show, conferred throughout the trial with Mr. Schultz who was prosecuting the action in behalf of the infant plaintiff, Michael Grace, Jr. The court also extended to Mr. Schultz the right to examine in respect of the allegations of the complaint in Action No. 1 and the issues raised in both Action No. 1 and Action No. 2. There was every opportunity for Michael Grace to have tried to have had the benefit of counsel and to have presented in full the entire matter which is the subject of this litigation. The plaintiffs' side of this litigation took almost three weeks of actual trial and within that period, for a case of this nature, there was a full and fair presentation of the issues. Mr. Haydon, until he was forbidden by Mr. Grace to do so, presented the plaintiff's case in Action No. 1 with skill and thoroughness. Mr. Schultz's presentation of the plaintiff's case in Action No. 2 and his questioning as to the issues in both actions was characterized by similar skill and thoroughness. Whatever motives Michael Grace had for delaying the trial were not fully clear to the

court. He has, however, continued to live in the property covered by the contract, substantially rentfree since the contract was signed.

Throughout the trial Michael Grace was accorded and took advantage of the opportunity to make statements at times when he was not under oath and this was noted in the record. From time to time he urged upon the court that he was unfairly dealt with claiming that he was not represented by counsel. The fact is, however, that he had a long succession of attorneys in and out of the negotiations which led to the contract of sale and in this particular litigation as well as others connected in greater or lesser degree with it. On one occasion during a luncheon recess Michael Grace met James E. Boboras, Esq., a lawyer of his acquaintance, and brought him back to the courtroom for the afternoon session. Mr. Boboras sat at the counsel table and assisted Mr. Schultz. During the progress of the trial on that afternoon Mr. Boboras spoke up from time to time in reference to the progress of that particular session. He was not seen or heard of again in the litigation after the close of that afternoon session. No explanation of his subsequent nonappearance was given.

Mr. Haydon, at the court's direction, was present at every session and remained throughout the trial ready to examine witnesses and to proceed except for the fact that Michael Grace requested that he not do so. No delay in the course of the trial beyond the delay from Tuesday morning to the following Monday morning already described was permitted. The court deemed itself justified in adhering to this position because (1) consideration of fairness to the defendants required it; (2) expedition of the court's business required it; (3) there was counsel actively presenting the case fully against the defendants on behalf of Michael P. Grace, Jr.; and (4) it might well be inferred from the long succession of lawyers retained by Michael Grace that his bad relationship with one lawyer after another was not without some fault on his part. It may be noted in passing that some phase of the matters in dispute in this litigation has been considered in each of the follow-

ing reported decisions (*Matter of Grace*, 2 N. Y. 2d 822, *supra*; *Grace* v. *Deepdale, Inc.*, 3 A. D. 2d 397; *Matter of Grace*, 2 A. D. 222, *supra*; *Grace* v. *Grace*, 155 N. Y. S. 2d 336). No less than a dozen attorneys, either as attorneys of record or of counsel, have represented Michael Grace and Corinne Grace, his wife, in this litigation and the cases just enumerated. Michael Grace testified during the trial that he attended three law schools although he had never taken a degree in law nor become admitted to practice in any court of the country. During the trial Michael Grace was continuously in attendance, except for short intervals of time. When present in the courtroom he sometimes occupied a seat in the spectator section from which position he frequently dispatched his wife, Corinne Grace, with oral or written messages to Mr. Schultz. At other times he occupied a seat at the counsel table and when there he conferred orally and in writing with Mr. Schultz. From time to time Michael Grace conferred with witnesses both in and out of the courtroom. His statements made when not under oath and noted in the record, as earlier mentioned, were at times delivered from a point in the spectator section of the courtroom and at other times from the counsel table. The demeanor of Michael Grace and his conduct in and about the courtroom during the trial showed clearly that he assumed general direction of the litigation on his own account.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 853

MICHAEL P. GRACE, II, individually and as a Trustee under the Last Will and Testament of JANET GRACE, *Petitioner,*

against

DEERDALE, INC., RYE PROPERTY OWNERS, INC., GRACE NATIONAL BANK OF NEW YORK, GRACE PROPERTIES INC., in Liquidation and ARNOLD JORGENSEN, COMMITTEE OF JANET MAUREEN GRACE, by Grace National Bank of New York and Michael P. Grace, II, its members, CHARLES McDONALD GRACE, individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, JOSEPH P. GRACE, JR., individually and as a Trustee under the Last Will and Testament of JANET GRACE, deceased, and JOHN P. BOLAND, *Guardian ad Litem* for JANET MAUREEN GRACE, *Respondents.*

PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO RESPONDENTS' BRIEFS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

I. Respondents Cannot Say That Petitioner's Dilemma Was His Own Fault

Respondent Committee's brief states (p. 2) that one of the questions presented is "when a plaintiff in a civil case has so abused his trial counsel as to cause

such counsel to decline further to confer with his client [etc.] . . . ." Evidently, Respondent Committee would have the Court believe that petitioner's trial counsel's pique was petitioner's fault. Perhaps it was; perhaps it was not; the record does not show. All the record shows is that petitioner's attorney was considerably upset about whatever transpired between him and petitioner, wanted to withdraw, and thought he should be allowed to withdraw. For all the record shows, the attorney may have taken undue umbrage at a legitimate though undiplomatic challenge of his strategy. See R. 675, where petitioner stated that the only difference between him and counsel was policy as to how to pursue the case. In fact, petitioner was even unaware that his attorney planned to withdraw until just before the trial resumed on October 15. R. 675. At any rate, the record is clear that petitioner immediately told the court that it "would be perfectly all right" if Mr. Haydon continued on as his attorney. R. 675. Mr. Haydon's insistence on withdrawing cannot be charged to petitioner in view of petitioner's willingness that he remain.

II. The Case Necessarily Turns on the Denial-of-Counsel Issue

It may be that on first glance, such as might be gathered from a summary application for extension of time, the case appears to present only a question of trial-court discretion in denying a continuance. Respondent Committee's brief (p. 6), and that of Respondents Joseph and Charles Grace (p. 2), so characterize the case. But what the facts actually show, as documented in our petition for certiorari, is that petitioner's counsel decided to withdraw, despite peti-

tioner's willingness that he remain; that the court would not permit him to withdraw; that he remained physically present only because of court order; that he did not in fact represent petitioner's cause and indeed would not even speak to him; and that the court refused petitioner a reasonable opportunity to engage counsel who would represent his cause. This as effectively denied petitioner his right to counsel as if the court itself had discharged petitioner's counsel and refused to allow new counsel to appear.

After directing Mr. Haydon to continue as petitioner's counsel, the court should have compelled Mr. Haydon to perform his duties, one of the most basic of which is the duty to confer with the client. This duty went unsatisfied. The court knew it and did nothing. From the moment the trial was resumed by Mr. Haydon under court order, petitioner was without effective counsel. He had warned the court he could not effectively represent petitioner. Despite the court's responsibility for the appointment, to its own knowledge the court permitted assigned counsel in the latter portion of the trial to sit passively and entitle himself to a fee by the mere passage of time. Respondents do not respond to this point in their briefs, but seek to draw a red herring across the path by characterizing the case as involving merely a question of adjournment, which is not the real issue.

Anyway, "discretion" is not a simple plea in bar. The fact that discretion on the part of the trial court exists does not mean that there are at least two ways in which it can be exercised without committing reversible error. This Court has reversed for abuse of discretion where admitted discretion was exercised in one of the only two ways open. *Langnes v. Green*, 282 U.S. 531, 541-542 (1931).

III. The Federal Question Was Adequately Preserved

Respondent Committee's brief states (p. 7) that no federal question was raised at trial, and makes much of the fact that petitioner did not cite chapter and verse of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. True, petitioner's protests were not couched in terms of the ordinary legal formula. This was because the court had deprived him of legal assistance. But what he was protesting about was as clear to the trial court as any lawyer could have made it, and the court showed it understood the exact nature of the protest by devoting almost a third of its opinion to the denial-of-counsel issue. Thus, the policy of the Federal statute to insure the trial court an opportunity to pass on claimed errors was fully satisfied. In any event, as soon as petitioner had a chance to engage counsel, and constantly thereafter, the technicalities of preserving the federal question were fully satisfied. Under the circumstances, petitioner could have done no more.

IV. The Case Is Not Moot

Respondent Committee's brief asserts the case is moot (p. 9) because petitioner failed to perfect his appeal as against the real party in interest. The notice of appeal was served at a time when petitioner was still without counsel, and so again the Federal Constitution forbids causing him to suffer for his ignorance of legal technicalities. In any event, if petitioner's contention that he was denied the right to counsel is upheld, the trial court's judgment was void, and the fact that two of the defendants might fortuitously have escaped from the case after such a void judgment is immaterial. The penalty on the play nullifies the touchdown. In *Roberts* v. *Anderson*, 66

F. 2d 874 (10th Cir. 1933), the party who had been denied counsel *did not even appeal;* yet in a later separate proceeding the first proceeding was voided because of the denial of counsel.

The claim of mootness was urged in the New York Court of Appeals, but that court did not dismiss on that ground. Real Property Owners and Deepdale were served as parties in the Court of Appeals, as with the petition herein, and hence are aware that the judgment dismissing them as parties is still subject to reversal, depending on the outcome of the denial-of-counsel issue in this Court.

V. Conclusion

The petition should be granted.

Respectfully submitted,

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